



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Dock Express Contractors, Inc.--Request for  
Reconsideration  
File: B-223966.2  
Date: March 4, 1987

### DIGEST

Prior decision holding that a protest against a solicitation specification initially filed 1 day before the closing date for the receipt of proposals with the procuring agency was untimely where the agency received proposals on the scheduled closing date without taking corrective action and the subsequent protest to our Office was filed more than 10 working days later is affirmed, since the protester has not presented a legal basis for us to overrule our decision or to waive our timeliness rule.

### DECISION

Dock Express Contractors, Inc. (DECI), requests that we reconsider our decision in Dock Express Contractors, Inc., B-223966, Dec. 22, 1986, 86-2 C.P.D. ¶ 695, in which we sustained DECI's protest against the restriction limiting competition to ocean common carriers as that term is defined in the Shipping Act of 1984, 46 U.S.C. App. § 1701 et seq. (Supp. II 1984), in request for proposals No. N00033-86-R-2100, issued by the United States Navy, Military Sealift Command (MSC), for ocean and intermodal transportation. DECI specifically requests reconsideration of the part of our decision that held that its protest was untimely with respect to the first cycle of the contract.

We affirm our prior decision.

The RFP solicited ocean transportation services for less than shipload lots of containerized and breakbulk cargo for various trade routes listed in the RFP for a 1-year period divided into two 6-month cycles. The first cycle extended from October 1, 1986, to March 31, 1987, and the second cycle extended from April 1, 1987, to September 30, 1987. Written offers for the first cycle were required to be submitted by July 9, 1986. Offers for the second cycle were due on January 7, 1987.

DECI initially protested the specification restricting the RFP to common carriers to MSC on July 8, 1986, while still submitting a timely proposal. MSC denied the protest on August 12, 1986, and DECI filed its protest at our Office on that date. We held that DECI's protest was untimely with respect to the RFP's first cycle because opening proposals on the scheduled closing date without taking any corrective action in response to the protest constituted initial adverse agency action under our Bid Protest Regulations. Under our Regulations, protests initially filed with the contracting agency must be filed at GAO within 10 working days of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (1986). Therefore, we only considered DECI's protest for the second cycle of the RFP.

DECI contends that our decision overlooked its earlier arguments as to the timeliness of the protest as it related to the first cycle of the RFP because these arguments were not specifically discussed in the decision. DECI contends that its protest should have been considered timely on the basis of these arguments. However, we fully considered these arguments before reaching our conclusion that the protest was untimely with respect to the first cycle.

DECI argued that the fact that it submitted its protest at 7:30 p.m. on July 8 made it unreasonable to conclude that the Navy intended adverse action by holding the closing date as scheduled on July 9. However, under our Bid Protest Regulations, whether the Navy intended adverse action on the protest is irrelevant, since opening proposals were in fact an adverse action on the protest.

We have consistently held that the fact that the procuring agency received proposals on the scheduled closing date without taking any corrective action in response to a protest constitutes initial adverse agency action under our Bid Protest Regulations promulgated to implement the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (Supp. III 1985), as well as under our Bid Protest Procedures that were in effect prior to CICA. See Sunrise Associates--Request for Reconsideration, B-219356.2, June 27, 1985, 85-1 C.P.D. ¶ 738; Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 C.P.D. ¶ 357; Hartridge Equipment Corporation, B-219982, Sept. 11, 1985, 85-2 C.P.D. ¶ 286.

Further, DECI advised that it relied on CICA and Federal Acquisition Regulation (FAR), 48 C.F.R. § 33.102(b)(1) (1986), in awaiting the contracting officer's formal decision

on the protest. In this regard, FAR, 48 C.F.R. § 33.102(b)(1), provides that an interested party wishing to protest is encouraged to seek resolution within the agency before filing a protest with the General Accounting Office or General Services Administration Board of Contract Appeals. DECI argued that the only reasonable interpretation that could be given to that regulation was that adverse agency action could not occur until the agency communicated, and the protester received, notice that it had resolved the agency-level protest. DECI indicated that the Navy advised by telex on July 22, 1986, that the protest was still under consideration, although its proposal was unacceptable. Therefore, DECI contended that the closing date did not constitute initial adverse action because the Navy had not resolved its protest.

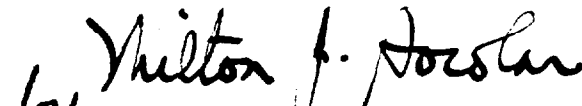
It is true that FAR, 48 C.F.R. § 33.102(b)(1), encourages protesters to initially seek resolution of their protests with agencies. However, bid protests are serious matters which can adversely impact on the procurement system unless effective and equitable procedural standards exist, so that all parties have a fair opportunity to present their cases, and protests can be resolved in a reasonably speedy manner without unduly disrupting the government's procurement process. We do not believe that filing an agency protest on the evening before the closing date for receipt of proposals gives an agency a reasonable opportunity to act upon the protest, except by either postponing the closing date or by accepting proposals. Therefore, if an agency proceeds with the procurement in these circumstances, without any corrective action, it clearly constitutes initial adverse agency action.

Moreover, DECI was advised on July 18, during the pendency of its agency protest, that its proposal would be unacceptable with respect to the specification that DECI had protested unless it became a common carrier. Nevertheless, DECI did not file within 10 days of the closing date for receipt of proposals, despite being aware that its proposal was unacceptable under the protested specification. Under these circumstances, DECI's decision to continue to pursue the protest at the agency and the Navy's subsequent denial of the protest did not alter the protester's responsibility to conform to the filing requirements of our regulations. See Leon's Auto Repair, B-215625, July 20, 1984, 84-2 C.P.D. ¶ 74.

DECI also contended that since CICA's requirement for "full and open" competition in drafting specifications has been largely uninterpreted, our Office should consider this matter as a significant issue under our Bid Protest Regulations, even if its protest is untimely. However, we consider untimely protests under the significant issue exception only when the matter raised is one of widespread interest to the procurement community and has not been considered on the merits in previous decisions. ABC Appliance Repair Services, B-221850, Feb. 28, 1986, 86-1 C.P.D. ¶ 215.

Finally, DECI contended that if its protest is considered untimely, we should waive our timeliness rule for good cause in view of the FAR, 48 C.F.R. § 33.102(b)(1), statement that protests should be submitted initially to the agency, which misled the protester. The good cause exception to the timeliness requirements is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest. ABC Appliance Repair Service, B-221850, supra. Since we find no ambiguity in the FAR, 48 C.F.R. § 33.102(b)(1), and our Bid Protest Regulations, the protester's misinterpretation of this regulation does not constitute good cause under our Bid Protest Regulations.

Accordingly, we affirm our prior decision.

*for*   
Comptroller General  
of the United States